In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1148

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Oregon Court of Appeals affirming respondent Naughten's conviction of armed robbery is reported at 3 Or. App. 241, 471 P.2d 830 (1970), and is set forth as Appendix A, pp. 14-15 of petitioner's printed petition for writ of certiorari. The opinion of the United States District Court for the District of Oregon denying Naughten's petition for a writ of habeas corpus is not reported, and is set forth as Appendix B, pp. 16-18, of petitioner's printed petition for writ of certiorari. The opinion of the United States Court of

Appeals for the Ninth Circuit reversing the judgment of the district court is not yet reported and is set forth as Appendix C, pp. 19-23 of petitioner's printed petition for writ of certiorari. The order of the circuit court denying the petition for rehearing is not reported, and is set forth as Appendix D, pp. 22-23 of petitioner's printed petition for writ of certiorari. The dissenting opinion of Circuit Judge Chambers is not yet reported, and is set forth in the printed Appendix, pp. 28-34.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (A. 26) was entered on May 30, 1972. A timely petition for rehearing en banc was denied on January 18, 1973 (Appendix D, petitioner's printed petition for writ of certiorari). The petition for a writ of certiorari was filed on February 20, 1973, and was granted on April 23, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

[1] Throughout this brief, "A." refers to the printed Appendix; "Tr." refers to the one volume transcript of Naughten's state-court trial, the only exhibit in the present federal habeas corpus proceedings.

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Does the Fourteenth Amendment prohibit an instruction to the jury in a state criminal trial, that all witnesses are presumed to speak the truth and describing the manner in which the presumption may be overcome, notwithstanding other specific instructions on the presumption of innocence and the burden of proof in criminal cases?

STATEMENT OF THE CASE

A state court jury convicted Hugh Naughten of the crime of assault and robbery while armed with a dangerous weapon. The conviction was affirmed by the Oregon Court of Appeals, *State v. Hugh Kyle Naughten*, 3 Or. App. 241, 471 P.2d 830 (1970). Petition for review was denied by the Oregon Supreme Court on September 22, 1970.

Naughten commenced the present federal habeas corpus action in the United States District Court for the District of Oregon, pursuant to 28 USC §§ 2241, et seq. The district court, per Solomon, J., denied the petition. On appeal, the Ninth Circuit, in an opinion by Ely, J., joined by Jertberg and Hufstedler, JJ., reversed and remanded.

Thereafter, petitioner, Hoyt C. Cupp, filed in the Ninth Circuit a petition for rehearing and suggestion of appropriateness for rehearing en banc. By a vote of six judges in favor of granting rehearing and six judges opposed, the petition for rehearing was denied. Chambers, C. J., wrote a separate opinion dissenting from the denial of rehearing, in which opinion he was joined by Goodwin, J. Naughten's present custodian, the petitioner herein, seeks review of the Ninth Circuit's decision.

Only one issue has been raised and preserved throughout these proceedings. That issue is whether the giving of a challenged instruction so placed the burden on Naughten to prove his innocence as to entitle him to relief in federal habeas corpus.

Naughten was tried before a state-court jury on the charge of assault and robbery while armed with a dangerous weapon. There was testimony at the trial that on August 17, 1968, a robbery occurred at a Quickie Mart in Portland, Oregon (Tr. 9-12). The owner, Mr. Livengood, identified Naughten as the robber. (Tr. 27). Mr. Weisinfluh, an eyewitness, also identified Naughten as the robber. (Tr. 61). Police officers Akers and Carpenter, who arrived on the scene shortly after the robbery, discovered Naughten near the scene. (Tr. 72-74, 88-89). Naughten did not testify and did not present any witnesses.

The trial court instructed the jury:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his

or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption". (A. 16; Tr. 137).

The instruction was based on Oregon statutory law. ORS 44.370. Naughten excepted to the giving of the instruction (A. 18; Tr. 140), and the instruction was assigned as error on appeal following conviction.

The trial court instructed the jury on the elements of the offense and other pertinent matters, including the following instructions on the burden of proof, presumption of innocence and the function of the jury in evaluating the evidence.

"* * * [T]he jury is the sole and exclusive judges of the facts and of the reliability to be given the testimony of any witness. Its findings as to the facts are final, and there is no procedure for correcting any mistakes it may make as to the facts. The jury's power, however, is not arbitrary; and if the Court instructs you as to the law on a particular subject or how to judge the evidence, you must follow such instructions. It is of the utmost importance, therefore, that in performing your functions as jurors, you understand the instructions which I shall give to you." (A. 12-13; Tr. 133).

* * *

"The law provides for certain disputable presumptions which are to be considered as evidence.

"A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence. However, since these presumptions are disputable presumptions only, they may be out-weighed or equaled by other evidence. Unless out-weighed or equaled, however, they are to be accepted by you as true.

"The law presumes that the defendant is innocent,

and this presumption follows the defendant until guilt is proved beyond a reasonable doubt.

"Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.

"Burden of Proof. The burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt.

"Reasonable doubt means an honest uncertainty as to the guilt of the defendant. A reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs.

"Your verdict should be based only upon these instructions and upon the evidence in this case. It is your duty to weigh the evidence calmly and dispassionately and to decide the questions upon their merits. You are not to allow, bias, sympathy, or prejudice any place in your deliberations, for all parties are equal before the law. Neither are you to base your decisions on guesswork, conjecture, or speculation. Furthermore, you must not consider what sentence might be imposed upon the defendant.

"In deciding this case you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question.

"A witness found to be intentionally false in a part of his or her testimony is to be distrusted in others. The term "witness" includes the parties.

"You are not bound to find in conformity with

the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence." (A. 15-17; Tr. 137-139).

At the conclusion of the prepared instructions, there was a conference out of the presence of the jury. The following colloquy occurred:

"MR. HOWLETT: I didn't prepare an instruction about the defendant not having the burden of—that he need not take the witness stand, and no inference of guilt should be considered upon his failure to do so, but if the Court would do it,—

"THE COURT: Well, I don't know, with your supercritical attitude, I might—if you want to make a request, I will be glad to consider it.

"MR. HOWLETT: I will request it, your Honor.

"THE COURT: Well, in writing.

"MR. HOWLETT: All right, I can write it down.

(Pause.)

"THE COURT: Do you have any exceptions?

"MR. BRUUN: No, I have no exceptions, your Honor. I haven't seen the instruction, though.

(Thereupon, the instruction was handed to counsel for the State.)

"MR. BRUUN: Your Honor, isn't there a standard instruction for this?

"THE COURT: There is.

"MR. BRUUN: I have no objection.

"THE COURT: I don't know whether you are entitled to it or not, but I have never known of a defendant that didn't take the stand where he wasn't convicted, so I don't think it makes any difference.

(Thereupon, the Court, counsel, the defendant,

and the reporter returned to the courtroom, where the following occurred within the presence of the jury:)

"THE COURT: Ladies and gentlemen of the jury, the Court in its instructions referred to burden of proof, and that the party upon whom the burden rests had the burden of proof. Of course, the defendant's plea of Not Guilty puts at issue every material allegation, matter and thing contained in the Indictment, and the presumption which belongs to the defendant and which goes with the defendant to the jury room of being not guilty relieves the defendant of any obligation for any burden of proof upon any facet of the case. And you are instructed that the defendant need not take the witness stand, and you may not infer any evidence of guilt from his failure to do so." (A. 20-22; Tr. 143-144).

SUMMARY OF ARGUMENT

Instructions regarding the presumed truthfulness of witnesses, and the manner in which the presumption may be overcome, have been frequently employed in state criminal prosecutions. Such instructions do not require that the defendant in a criminal case present contradictory evidence, and the jury is free to reject the testimony of prosecution witnesses if it finds the testimony unworthy of belief. The instructions do not shift the burden of proof to the defendant, nor do they impinge upon the presumption of innocence, either intrinsically or by virtue of being expressed in terms of a presumption which aids the prosecution. No federally protected constitutional right was violated by the instruction, because the jury was given explicit instructions on the burden of proof and the presumption of

innocence. Moreover, the error in giving the instruction, if error it was, was harmless beyond a reasonable doubt in this case, because of the overwhelming evidence of guilt.

ARGUMENT

A. The instruction that witnesses are presumed to speak the truth, together with instructions describing the manner in which the presumption may be overcome, was proper under state law, and is a rational description of the process of evaluating the testimony of a witness.

As indicated in the Statement of the Case above, the challenged instruction given in Naughten's state court trial was:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption."

The instruction was based, almost verbatim, on Oregon statutory law. Or. Rev. Stat. 44.370. That statute came into Oregon law in 1862 as the product of a code commission headed by Judge Matthew Deady. Deady's General Laws of Oregon 1845-1864, § 673. No record exists indicating the source from which the section was taken. Although the statute does not require that the jury in a criminal case be so instructed, the Oregon Supreme Court has held that an instruction in the language of the statute was proper in a criminal case in which the defendant presented no evidence. *State v. Kessler*, 254

Or. 124, 458 P.2d 432 (1969). Defendant's conviction was affirmed by the Oregon Court of Appeals. *State v. Naughten,* 3 Or. App. 241, 471 P.2d 830 (1970).

From 1872 until the enactment of a new evidence code in 1965, California Civil Procedure Code § 1847 (West, 1954) provided:

> "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

Instructions to this effect were the subject of reported decisions in *People v. Amaya,* 134 Cal. 531, 66 P. 794 (1901) and *People v. Sheffield,* 9 Cal. App. 130, 98 P. 67 (1908).

Similar instructions were upheld in Iowa: *State v. Wehde,* 236 Iowa 47, 283 N.W. 104 (1938) and *State v. Voelpel,* 208 Iowa 1049, 226 N.W. 770 (1929), and the presumption of truthfulness was asserted in *State v. Ormiston,* 66 Iowa 143, 23 N.W. 370 (1885).

In *State v. George,* 113 S.C. 154, 102 S.E. 284 (1920), that jurisdiction not only recognized a presumption of truthfulness, but held that it was error to instruct the jury that there was no presumption that a witness tells the truth.

One of the earliest federal cases to refer to a presumption of truthfulness was *Camp v. United States,* 297 F. 452, 454 (8th Cir. 1924). A similar expression was contained in *Wom Kam Chong v. United States,* 111

F.2d 707, 711 (9th Cir. 1940). In *Wichman v. Allis Chalmers Mfg. Co.*, 117 F. Supp. 857, 860 (W.D. Mo., 1954), the court noted:

> ". . . [i]t is the rule that a witness is presumed to speak the truth. 70 C. J., Section 915, p. 760. And it is the duty of the trier of a fact to harmonize evidence by assuming on disputed matters that each witness was attempting to tell the truth and that he was mistaken on any factual question rather than committing perjury."

In each of these federal cases, the presumption that witnesses were truthful was invoked by a trial or appellate court in weighing evidence which was in whole or in part unimpeached, and no jury instruction was involved.

A charge to the jury including such an instruction was set forth in *United States v. Dried Fruit Assoc. of California*, 4 F.R.D. 1 (N.D. Cal. 1944), but no challenge to the instruction was indicated.

The presumption of truthfulness emerged fully in the federal courts in 1961 in Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 67-68 (1961), containing Instruction No. 3.01:

> "You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive

and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

"Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves."

Subsequent federal decisions appear to ascribe the instruction directly to Judge Mathes's now superseded model. Since Judge Mathes was a federal trial judge in California, it seems likely that he derived the instruction from familiarity with practice in that state. In *Marsh v. United States*, 402 F.2d 457 (9th Cir. 1968), it was noted that the use of the instruction was common in the Ninth Circuit, which includes California and Oregon.

A number of federal circuit courts have criticized the use of similar instructions in federal trials. One of the first of these decisions was *Knapp v. United States*, 316 F.2d 794, 795 (5th Cir. 1963), wherein the court referred to the Mathes instruction as "platitudinous

generalities". Noting that no objection had been made on trial, the court said:

> "It is to say, though, that the use of these glittering generalities in this case was not error at all, much less plain error."

The Ninth Circuit, in the opinion below, noted recent decisions which have continued to disapprove of the use of the instruction in federal trials. See, *e.g.*, *United States v. Johnson*, 371 F.2d 800 (3d Cir. 1967); *Stone v. United States*, 379 F.2d 146 (D.C. Cir 1967); *United States v. Meisch*, 370 F.2d 768 (3d Cir 1966); and *United States v. Persico*, 349 F.2d 6 (2d Cir. 1965). Only in *Johnson* does it appear that the giving of the presumption instruction, in and of itself, warranted reversal.

Beginning an evaluation of a witness's testimony with a "presumption" that he will testify truthfully is a reflection of the manner in which historical facts are proved in a courtroom. Witnesses are summoned and sworn on oath to tell the truth. Traditionally, testimony under oath, like documents which are acknowledged or are under seal, has been accorded a verity not given to less formal statements. The witness is permitted by the rules of evidence to relate only those facts within his personal knowledge, and his testimony is subject to forensic testing by cross-examination, exclusion of other witnesses, the requirement of confrontation and the like. Finders of fact are persons chosen for their lack of prior knowledge of the facts and absence of predisposition regarding the case. The responsibility for determining the credibility of witnesses is assigned to citizen jurors who

are called upon to hear the evdence, heed the court's instructions on the law, and exercise objective judgment and good sense in finding the truth. The instruction that a witness is presumed to speak the truth, but that the presumption may be overcome, simply reminds the jurors of their responsibility to decide the case based on the evidence. Testimony should be heard with a willingness to believe the testimony if it is determined to be worthy of belief. In short, the jury is to be objective and critical, but not nihilistic.

Petitioner does not contend that the disputable presumption of witness truthfulness is the only reasonable method of evaluating witness credibility. See, *e.g.*, *Stix v. Keith*, 85 Ala. 465, 5 So. 184 (1888), which rejected the presumption of truthfulness on analytical grounds. Nevertheless, there is a substantial body of law, including that of Oregon, which accords the name, if not the substance, of a presumption to the notion that the jury is to hear the evidence with an open mind, and a willingness to accept testimony which it finds worthy of belief.

This Court made it clear in *In re Winship*, 397 U.S. 358 (1970) that the requirement that the prosecution in criminal cases prove guilt beyond a reasonable doubt is mandated by the Fifth Amendment, and is applicable to the states through the Fourteenth Amendment. Thus far, the Court has not directed that in addition, the jury in state criminal prosecutions be instructed at the conclusion of the evidence that the defendant is presumed to be innocent. As will be seen, instructions on pre-

sumptions favorable to the prosecution frequently, if not always, have the effect of running counter to a presumption of innocence instruction.

The instruction in the present case did not conflict with the requirement of proof beyond a reasonable doubt. An explicit instruction on the presumption of innocence was given. The issue is whether the presumption of truthfulness instruction impermissibly conflicted with the instruction on the presumption of innocence.

Abiding the Court's decision on whether an instruction on the presumption of innocence is required, petitioner contends that the presumption of truthfulness instruction does not significantly diminish the presumption of innocence. To the extent there is an arguable infringement, the presumption of truthfulness instruction is so innocuous in its reflection on the presumption of innocence as not to amount to a substantial conflict with federal due process standards.

The presumption of witness truthfulness, by its very terms, does not require defendant to produce either impeaching or contradictory evidence. A witness called by the prosecution may be disbelieved, based solely upon the manner in which the witness testifies, or the nature of his or her testimony.

In granting Naughten federal habeas corpus relief, the Ninth Circuit reasoned that since Naughten did not testify or present any witnesses in his defense, the effect of the challenged instruction was to place on Naughten the burden of proving his innocence.

If the presumption of truthfulness is a rational method of evaluating testimony by a trial or appellate court in a civil case in determining whether one party or the other is entitled to judgment as a matter of law based on uncontradicted testimony, or in a criminal case in which defendant presents testimony, it would seem that the fact that defendant in a criminal case does not present testimony would not alter the validity of the presumption as an analytical tool.

Witnesses to an event are chosen by the event itself and not by the prosecution. It makes no sense to say that the method of analyzing witness testimony, by presumption of truthfulness or otherwise, must vary depending on whether defendant presents witnesses who testify in conflict with those called by the state. The prosecution's burden of proof beyond a reasonable doubt remains constant, whether or not defendant testifies or calls witnesses. If he testifies or presents witnesses, the presumption of truthfulness applies to all witnesses.

It may well be that the presumption of truthfulness is not a true presumption at all, because by its terms it does not require the production of contrary evidence. If the initial assumption of truthfulness is not sufficiently strong to warrant properly being denominated as a presumption, it is difficult to see how it can be regarded as sufficiently potent to impinge upon the presumption of innocence, thrust upon defendant the burden of proof and diminish the requirement of proof beyond a reasonable doubt.

It is proper for federal circuit courts to determine that the use of certain instructions given by district courts in criminal trials should be discontinued, for any of a variety of reasons. The propriety of an instruction in state courts is a matter of state law, unless a significant impairment of federally protected constitutional rights is involved. No such significant impairment is presented here.

B. The instruction that witnesses are presumed to speak the truth, in the context of other instructions, did not shift to defendant the burden of proof or impinge on the presumption of innocence.

The Ninth Circuit held that since Naughten did not testify or present any witnesses in his defense, the effect of the challenged instruction was to place the burden on him to prove his innocence, and there was no other instruction so specifically directed to that under attack as could be said to effect a cure.

It is true that, taken in the abstract, an instruction that the only witnesses in the case were presumed to be truthful, presents a colorable issue of impingement on the presumption of innocence. However, the instruction must be viewed in context to be viewed fairly. In the present case, there was no reasonable possibility that the jury could conclude that they were required to accept the testimony of the prosecution witnesses at face value, or that the burden of proof had shifted to the defendant.

The instruction on the presumption of truthfulness

included the instruction that the presumption might be overcome not only by impeaching or contradictory evidence, but also:

> ". . . by the manner in which the witness testifies, by the nature of his or her testimony, . . . or by a presumption." (A. 16; Tr. 137)

The only other presumption on which the jury was instructed was the presumption of innocence. (A. 16; Tr. 137).

The jury was instructed that they were the sole and exclusive judges of the facts and of the reliability to be given the testimony of any witness. (A. 12; Tr. 133).

They were charged that the burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt. The instructions on reasonable doubt included the following:

> "Reasonable doubt means an honest uncertainty as to the guilt of the defendant. A reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs." (A. 16; Tr. 137-138).

They were also instructed:

> "In deciding this case you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question." (A. 17; Tr. 138)

The reference to "which party has the burden of proof" was later corrected.

The jury was also told:

"You are not bound to find in conformity with the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does not produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence." (A. 17; Tr. 138-139).

Following the giving of the prepared instructions, the court, the attorneys, Naughten and the court reporter left the jury in the courtroom and conferred in chambers regarding exceptions to the instructions. Counsel for Naughten excepted to a number of instructions. All of the exceptions were based on an expressed concern that the jury might have the feeling that Naughten had some duty to take the witness stand or present evidence. Counsel also asked for an instruction that guilt was not to be inferred from defendant's failure to testify, or present evidence. (A. 18-21; Tr. 140-143). Thereafter, the court, the attorneys, Naughten and the reporter returned to the courtroom, and the court gave the following further instruction:

"Ladies and gentlemen of the jury, the Court in its instructions referred to the burden of proof, and that the party upon whom the burden rests had the burden of proof. Of course, the defendant's plea of Not Guilty puts at issue every material allegation, matter, and thing contained in the Indictment, and the presumption which belongs to the defendant and which goes with the defendant to the jury room of being not guilty relieves the defendant of any obli-

> gation for any burden of proof upon any facet of the case. And you are instructed that the defendant need not take the witness stand, and you may not infer any evidence of guilt from his failure to do so." (A. 21-22; Tr. 144)

The jury having been again reminded by a special instruction separate from all others that Naughten was presumed to be innocent and that he had no burden of proof, it is inconceivable that they could have gone to the jury room thinking the contrary. Surely they did not partake of the emphasis which has been laid upon the presumption of truthfulness instruction by federal circuit courts. It is unlikely that they were able to remember it, even as a "platitudinous generality." In the context of instructions which were otherwise fair and sufficient, fair-minded laymen could not possibly have regarded the presumption of truthfulness instruction as shifting the burden of proof to defendant.

The Ninth Circuit did not regard the trial court's last instruction as curing the presumption of truthfulness instruction. The trial court was not required to retract the presumption instruction. The claimed vice of the presumption instruction is that it suggested that the burden of proof had shifted to defendant. The final instruction made it very clear that defendant was presumed to be innocent, and that he had no burden of proof.

C. The instruction that witnesses are presumed to speak the truth, and describing the manner in which the presumption may be overcome, does not violate

federal due process standards merely because the principle is couched in terms of a presumption.

It is generally recognized, and the state trial court's instructions advised the jury, that a presumption is a deduction which the law directs to be made from particular facts, and that disputable presumptions may be out-weighed or equaled by other evidence, but unless outweighed or equaled, they are to be accepted as true. (A. 15-16; Tr. 137-138). The presumption of witness truthfulness, by its very terms, does not require disputation by other evidence. The presumption of truthfulness "may be overcome by the manner in which the witness testifies [or] by the nature of his or her testimony", as well as by impeaching or contradictory testimony, or by a presumption." (A. 16; Tr. 137).

Expressed in terms of a presumption, the assumption that a witness will testify truthfully is weak enough considering that it may be overcome by the witness himself or the testimony itself, without more. Absent the title of a presumption, the force of the assumption is negligible indeed.

Does the fact that the assumption of truthfulness principle is designated as a presumption, result in impermissibly shifting to the defendant the burden of proving his innocence? Petitioner contends that it does not, because: (1) "the "presumption" in question intrinsically denies that it has that effect, and (2) because the use and explanation of presumptions, even if favorable to the prosecution, are not regarded as so inherently

subject to misapplication by juries as to conflict with the more pervasive presumption of innocence.

It is unnecessary to catalogue all of the presumptions which may be invoked to aid the government's case, and on which trial juries will be required to be instructed, along with instructions on the burden of proof and the presumption of innocence. Suffice it to consider the number of trials every judicial day wherein juries are instructed on the statutory presumptions which attend proof of various levels of blood-alcohol content in cases involving driving under the influence of intoxicating liquor.

In *Leary v. United States*, 395 U.S. 6 (1969), this Court upheld the statutory presumption that marihuana had been imported into the United States illegally, while striking down the presumption that the possessor knew of the illegal importation. See also *United States v. Romano*, 382 U.S. 136 (1965) (presumption that person present at still had possession of still, stricken); *United States v. Gainey*, 380 U.S. 63 (1965) (presumption that person present at still was a distiller, upheld); *United States v. Tot*, 319 U.S. 463 (1943) (presumption that firearm was subject of illegal interstate shipment if possessed by ex-convict, stricken). In those cases, the test of the validity of the presumption was held to be the rationality of the connection between the fact proved and the fact presumed. *United States v. Leary*, 395 U.S. at 36.

Thus, the fact that a presumption aids the prosecution does not *per se* impinge upon the presumption of

innocence or violate due process standards by shifting the burden to defendant to prove his innocence. It is true that the presumptions in *Leary*, *Romano*, *Gainey*, and *Tot* applied only to one element of the offense. That element was nevertheless central to criminality in each case, and the theoretical risk that a jury may confuse the presumption favoring the government with that favoring the defendant is no greater in the present case than with any other presumption the validity of which has been upheld.

The presumption here considered does not result in the jury being advised that because a witness has testified, his testimony is presumed true and must be accepted unless contradicted by defendant. The instruction as to the effect of a presumption does not give to the presumption a mandatory character beyond the scope of the presumption itself; otherwise, all presumptions suffer from the same vice. It cannot be assumed that the jury gave to the instructions a meaning which contradicts the instruction itself.

D. The instruction complained of was harmless in any event, in view of overwhelming evidence of guilt.

In his dissent from the denial of the petition for rehearing in the Ninth Circuit, (A. 28-34) Circuit Judge Chambers correctly pointed out that the trial testimony consisted of the testimony of the victim of the robbery, and a friend of the victim who was present in the store during the robbery, two officers who apprehended Naughten and a detective. The two eyewitnesses had

ample opportunity to observe Naughten, who was the sole robber. They positively identified him. As Judge Chambers noted there was:

> ". . . precious little discrepancy in the testimony—only the slight variances that tend to confirm veracity of two witnesses to the same event." (A. 33)

Judge Chambers believed that under *Chapman v. California*, 386 U.S. 18 (1967), and *Harrington v. California*, 395 U.S. 250 (1969), the alleged error was harmless beyond a reasonable doubt. The district court found that "the evidence of guilt was so overwhelming" that the error was harmless under *Harrington*. The Ninth Circuit concluded that the petitioner could not, in this case, meet the burden of establishing harmless error. In reaching that result without analysis, the Ninth Circuit panel apparently adopted the view that any constitutional "error" was prejudicial *per se*, which was the minority view in *Chapman*. Petitioner contends that under the *Chapman - Harrington* analysis, the error was harmless beyond a reasonable doubt. There was simply no reasonable possibility that the jury could have misconstrued an innocuous instruction to shift the burden of proof to the defendant. In any event, the evidence of guilt was overwhelming. There was simply no reasonable construction of the testimony from which innocence, or significant witness error, could be inferred.

CONCLUSION

For the above reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and the judgment of the United States District Court for the District of Oregon affirmed.

Respectfully submitted,

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